Nova Law Review

Volume 13, *Issue* 1 1988 *Article* 17

Parental Consortium in Florida: Our Children Have No Place to Turn

Keith Metcalf*

*

Parental Consortium in Florida: Our Children Have No Place to Turn

Keith Metcalf

Abstract

Since 1980, seven states have recognized the doctrine of parental consortium as a valid cause of action.

Parental Consortium in Florida: Our Children Have No Place to Turn

I. Introduction

Since 1980, seven states have recognized the doctrine of parental consortium[1] as a valid cause of action.[2] Six of these states have decided the issue by case law while the other state decided the issue by statutory application. The Florida Supreme Court had the opportunity to join this trend by recognizing parental consortium as a valid cause of action.[3] Instead, the Supreme Court chose to deny recognition.

In order to analyze the Supreme Court's decision, it is necessary to briefly consider the development at common law of the loss of parental consortium action. This note will analyze the various reasons for denying the cause of action and demonstrate why these reasons are unpersuasive. Florida's position on parental consortium and Alaska's position are as far apart as are the two states. Their relative positions will be analyzed and compared. This note will illustrate how the Florida Su-

1. Damages for loss of consortium are commonly sought in wrongful death actions, or when a spouse has been seriously injured through the negligence of another, or by a spouse against a third person alleging that he has caused a breaking up of the marriage. "Loss of consortium" means loss of society, affection, assistance and conjugal fellowship, and includes loss or impairment of sexual relations. BLACK'S LAW DICTIONARY 280 (5th ed. 1979).

2. Audobon-Exira v. Ill. Cent. Gulf RR. Co., 335 N.W.2d 148 (Iowa 1983) (court interpreted statutory language of wrongful death statute to permit recovery by the child whether the parent is injured or killed); IOWA CODE ANN. § 611.22 (West Supp. 1985) provides in part: Any action contemplated in sections 611.20 and 611.21 may be brought, or the court, on motion, may allow the action to be continued, by or against the legal representatives or successors in interest of the deceased. Such action shall be deemed a continuing one, and to have accrued to such representative or successor at the time it would have accrued to the deceased if he had survived. If such is continued against the legal representative of the defendant, a notice shall be served on him as in the case of original notices; Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991 (Alaska 1987); Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (1980); Berger v. Weber, 411 Mich. 1, 303 N.W.2d 424 (1981); Hay v. Med. Center Hosp., 145 Vt. 533, 496 A.2d 939 (1985); Ueland v. Reynolds Metals Co., 103 Wash. 2d 131, 691 P.2d 190 (1984); Theama v. City of Kenosha, 117 Wis. 2d 508, 344 N.W.2d 513 (1984).

3. Zorzos v. Rosen By and Through Rosen v. Zorzos, 467 So. 2d 305 (Fla. 1985).

preme Court has failed to fully understand the reasoning upon which the Florida Supreme Court based its decision to deny recognition.

Florida refuses to recognize loss of parental consortium when a parent is injured.[4] However, Florida's Wrongful Death Act recognizes loss of parental consortium when the parent is killed by another party's negligence.[5]

In *Clark v. Suncoast Hospital, Inc.*,[6] the Florida Second District Court of Appeal held in a case of first impression that a dependent child does not have a claim for lost parental consortium when the parent lives.[7] In *Clark*, the father of the plaintiffs suffered brain damage, paralysis and personality changes as a result of defendant's negligence during surgery.[8] The Clark children argued that because of the injuries, they are denied the love, moral training and the examples and guidance their father would have provided.[9] The District Court admitted that the children's argument was compelling, but cited numerous reasons why the action should not be recognized.[10] The District Court concluded by stating that the legislature should address the issue after a thorough study.[11]

The *Clark* court refused to recognize a minor child's claim for loss of consortium based on the following reasons:

(1) the lack of precedent;[12]

(2) judicial incompetence;[13]

(3) the possibility of multiple claims;[14]

---

4. *Zorzos*, 467 So. 2d at 305.

5. FLA. STAT. § 768.21(3) (1987) provides in part: "minor children of the decedent may also recover for loss of parental companionship, instruction, and guidance and for mental pain and suffering from the date of the injury."

6. 338 So. 2d 1117 (Fla. 2d Dist. Ct. App. 1976).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 1119.

12. *See also* Jeune v. Del E. Webb Constr. Co., 77 Ariz. 226, 227-28, 269 P.2d 723, 724 (1954); Clark v. Suncoast Hosp. Inc., 338 So. 2d 1117 (Fla. 2d Dist. Ct. App. 1976); Gen. Elec. Co. v. Bush, 88 Nev. 360, 368, 498 P.2d 366, 371 (1972); Cox v. Stretton, 77 Misc. 2d 155, 159, 352 N.Y.S.2d 834, 840 (Sup. Ct. 1974).

13. *See also* Pleasant v. Washington Sand & Gravel Co., 262 F.2d 471, 473 (D.C. Cir. 1958); Koskela v. Martin, 91 Ill. App. 3d 568, 570, 414 N.E.2d 1148, 1150 (1980); Hankins v. Derby, 211 N.W.2d 581, 584 (Iowa 1973); Duhan v. Milanowski, 75 Misc. 2d 1078, 1084, 348 N.Y.S.2d 696, 703 (Sup. Ct. 1973).

14. Borer v. American Airlines, 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr.

(4) uncertain damages which may not adequately compensate the child's loss;[15]

(5) the possibility of double recovery;[16]

(6) the cost to the public of expanding the doctrine through increased insurance rates;[17]

(7) defendants' liability will increase;[18]

(8) a serious possibility of intrafamilial disputes;[19] and

(9) the lack of a duty to the child.[20]

II. Discussion of the *Clark* Court's Reasons for Denying the Cause of Action and Why These Reasons are Unpersuasive

A. The Lack of Precedent

Courts which refuse to recognize a child's cause of action for loss of consortium, on the basis that no precedent for such a claim exists, also argue that it is not a judicial function to make such major changes in the common law and that only the legislature should authorize recognition of the child's claim.[21]

---

302 (1977); Hoffman v. Dautel, 189 Kan. 165, 167-68, 368 P.2d 57, 59-60 (1962).

15. Suter v. Leonard, 45 Cal. App. 3d 744, 120 Cal. Rptr. 110 (1975); *Hoffman*, 189 Kan. at 165, 368 P.2d at 57; Russell v. Salem Transp. Co., 61 N.J. 502, 507, 295 A.2d 862, 864 (1972); *Duhan*, 75 Misc. 2d at 1078, 348 N.Y.S.2d at 696.

16. *Hoffman*, 189 Kan. at 165, 167, 368 P.2d at 57, 58-59.

17. Ueland v. Reynolds Metals Co., 103 Wash. 2d 135, 140, 691 P.2d 190, 195 (1984) (two minor children brought an action against defendants requesting damages for loss of parental consortium when their father was struck by a cable while employed by the defendants). Some courts have argued that recognizing a new cause of action will result in increased insurance rates to the general public. The *Ueland* Court rejected this argument by asserting that "the specter of increased insurance rates is one of our least concerns" and that this is the standard argument raised against recognizing a new cause of action in tort law. *Id.*

18. *Russell*, 61 N.J. at 502, 504, 295 A.2d at 862, 864. In *Russell*, the father was killed and the mother seriously injured in an automobile accident. The children subsequently brought a loss of consortium action as a result of mother's injuries sustained in the accident. The *Russell* Court held that allowing the claim would substantially increase the liability of a tortfeasor arising out of a single negligent act. Each child of an injured parent would be permitted a separate claim and each claim would be entitled to separate appraisal and award. The court asserted that this would place too much of a burden on the community and denied the action. *Id.*

19. Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991 (Alaska 1987).

20. DeAngelis v. Lutheran Med. Center, 84 A.D.2d 17, 445 N.Y.S. 2d 188 (App. Div. 1981).

21. *See also* Jeune v. Del Webb Constr. Co., 77 Ariz. 226, 269 P.2d 723 (1954);

Courts are under no duty to perpetuate laws which are based on reasoning which is no longer valid.[22] Judicial incompetence, the argument that courts are not the proper forum for resolution of certain legal conflicts, must be balanced against the judiciary's traditional role in the development of the common law.[23] Courts do not hesitate to recognize new causes of action when necessary to adapt the common law to society's changing needs.[24]

In *Spokane Methodist Homes, Inc. v. Department of Labor and Industries*,[25] the court concluded that the common law can be changed when a court becomes convinced that the rationale upon which the common law rules are based is no longer valid or were initially erroneous. Furthermore, while precedent may be a significant element in the

---

Russell v. Salem Transp. Co., 61 N.J. 502, 295 A.2d 862 (1974); Koskela v. Martin, 91 Ill. App. 3d 568, 571, 414 N.E.2d 1148, 1151 (App. Ct. 1980). In *Koskela*, the court recognized that the common law "is a set of broad and comprehensive principles susceptible of judicial adoption to changing social conditions and evolving concepts of justice, but the lack of sound precedent must be considered as a bar to recognizing this cause of action." *Koskela*, 91 Ill. App. at 571, 414 N.E.2d at 1151. The court is asserting that the common law can be changed when needed, but in this case the need is not there. *Id.*

22. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1896-97).

> It is revolting to have no better reason for a rule of law that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

23. Friedman, *Legal Philosophy and Judicial Lawmaking*, 61 COLUM. L. REV. 821 (1961). [hereinafter Friedman]

> In this type of society, which comprises a wide range of constitutional and political systems, the judiciary enjoys certain constitutional or statutory guarantees of independence, reinforced by tradition and public policy. That in this kind of society, the judiciary has played a major part in the evolution of the law should no longer be a matter of serious controversy. It is sufficient to compare, for example, the English or American law of torts with that of fifty years ago . . . to appreciate the influence that the judiciary has exercised . . . and in the change of basic legal policies. *Id.*

The judiciary is independent and can change common law at its discretion. *Id.* Changes in tort law in the past half century is evidence of the judiciary's power to change the common law.

24. Hitaffer v. Argonne Co., 183 F.2d 811, 816 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950), overruled on other grounds in Smither & Co. v. Coles, 242 F.2d 220, 226, 100 U.S. App. D.C. 68, 74 (1957) (recognized wife's claim for loss of spousal consortium); Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991 (Alaska 1987) (recognizing minor child's claim for loss of consortium).

25. 81 Wash. 2d 283, 501 P.2d 589 (1972).

process of judicial deliberation, precedent should not control to the exclusion of all other factors.[26] By definition, if courts failed to act until precedent was set, the common law would remain static.[27]

B. Deference to the Legislature

Many jurisdictions hold that the legislature is better equipped to make sure that all aspects of an issue are analyzed and considered.[28] Other jurisdictions have held that they are not permitted to recognize consortium claims due to existing legislation.[29] However, in jurisdictions where the legislature has not acted, the courts do not have to wait for the legislature to act.[30] Other legislatures do not have adequate time to keep abreast of all the changes that need to be made, due to crowded legislative calendars.[31] It can be years before areas requiring consideration are brought to the legislature's attention. Even then, "more publicized and visible political issues will occupy the attention of the legislators, leaving it to special interest groups to block any possible legislation on matters which get little media attention such as consortium."[32] Therefore, for example, "it is the judiciaries' responsibility to

---

26. Note, *Recovery for Lost Parental Consortium: Nightmare or Breakthrough?*, 9 NOVA L.J. 183, 195 (1984) [hereinafter *Recovery*].

27. *Id.* at 195.

28. Koskela v. Martin, 91 Ill. App. 3d 568, 571, 414 N.E.2d 1148, 1151 (App. Ct. 1962) (handicapped child of severely injured parent brought an action for loss of parental consortium against third party).

29. Norwest v. Presbyterian Intercommunity Hosp., 52 Or. App. 853, 856, 631 P.2d 1377, 1380 (Ct. App. 1981). "Where the legislature has thoroughly involved itself in an area of the law and where its decisions in that area appear to set discreet boundaries, we think that it should be left to the legislation to change those boundaries, if they are to be changed, and to define the new ones." *Id.* at 856, 631 P.2d at 1380.

30. Shockley v. Prier, 66 Wis. 2d 394, 397, 225 N.W.2d 495, 497-98 (1975). The *Shockley* Court asserted that even if the legislature has refused to act, the courts have the right to make needed changes. *Id.*

31. Note, *Right of the Child to Recover Damages From One Who Has Negligently Injured Either Parent*, 8 S. C. L. Q. 477, 480 (1956) [hereinafter *Right of the Child*].

> In these days of crowded legislative calendars, who is going to take the necessary time to draft, introduce, and crusade for such legislation, and where will the support come from to offset the concentrated efforts of the highly organized professional lobbyist? *Id.*

32. Note, *The Child's Cause of Action For Loss of Consortium*, 5 SAN FERN. V.L. REV. 449, 459 (1977) [hereinafter *Child's Cause of Action*]. The author explained that the [illegible] carries very little political support, and consequently, the

make needed changes in the common law to permit the child to recover for loss of parental consortium when the parent is negligently injured."[33]

In *Hibpshman v. Prudhoe Bay Supply, Inc.*,[34] the judiciary did not defer to the legislature. The Alaska Supreme Court stated that it would not hesitate to recognize new common law causes of action regarding injuries to family members.[35] The court further asserted that it would be inappropriate to wait for the legislature to act in order to adapt the common law to society's needs.[36] Accordingly, the court reasoned that it had the power to recognize the loss of parental consortium.[37]

C. Multiple Claims and Increased Litigation

In *Russell v. Salem Transportation Co.*,[38] three minor children brought an action for loss of parental consortium. The mother was severely injured in an automobile accident which also killed the father.[39] The *Russell* court expressed concern that recognizing the children's loss of consortium claim would result in increased litigation.[40] There

---

lobbyists will stop the legislature from recognizing parental consortium.

33. Note, *The Child's Claim For Loss of Consortium Damages: Logical and Sympathetic Appeal*, 13 SAN DIEGO L. REV. 231, 250 (1975).

34. Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 993 (Alaska 1987).

35. *Id.* at 995.

36. *Id.* at 997.

37. *Id.*

38. 61 N.J. 502, 504, 295 A.2d 862, 864 (1972).

39. *Id.* at 503, 295 A.2d at 863.

40. *Id.*

> If the claim were allowed there would be a substantial accretion of liability against the tortfeasor arising out of a single transaction . . . [w]hereas the assertion of a spouse's demand for loss of consortium involves the joining of only a single companion claim in the action with that of the injured person, the right here debated would entail adding as many companion claims as the injured parent had minor children, each such claim entitled to separate appraisal and award. The defendant's burden would be further enlarged if the claims were founded upon injuries to both parents. Magnification of damage awards to a single family derived from a single accident might well become a serious problem to a particular defendant as well as in terms of the total cost of such enhanced awards to the insured community as a whole. *Id.* at 504, 295 A.2d at 864.

The Court is asserting that if the action is recognized, there is the possibility that the victim's family individually could sue the tortfeasor. One negligent act could result in

can be no denying that if such a claim were to be recognized, every permanent injury to a parent could result in a possible action by the child.[41] In *Eschenbach v. Benjamin*,[42] the court noted that if the various claims are brought separately, the defendant would be forced to defend a number of lawsuits arising from his single tortious act.[43]

The Alaska Supreme Court rejected this concern and concluded that the child's action should be joined with the injured parent's cause of action whenever feasible.[44] Several other jurisdictions have also required joinder of the child's and parent's cause of action whenever feasible.[45]

One court acknowledged that the fear of increased litigation is always present when the courts are required to recognize a new cause of action.[46] The *Hibpshman* court noted that if procedures make it difficult to join separate claims, the solution is to revise the procedures, not deny a valid claim merely because joinder is difficult.[47] Courts should reject the multiple lawsuit rationale since the tortfeasor may be encouraged to settle with the tort victim and his family rather than face the possibility of a series of lawsuits.[48] Therefore, permitting the cause

---

three or more lawsuits. *Id.*

41. Borer v. Am. Airlines, 19 Cal. 3d 441, 444, 563 P.2d 858, 860-61, 138 Cal. Rptr. 302, 305 (1987) (minor children sued manufacturer for loss of consortium when their mother was injured by a fallen light fixture); Hoffman v. Dautel, 189 Kan. 165, 166, 368 P.2d 57, 58 (1962) (three minor children sued defendants for loss of consortium when their father suffered severe brain damage as a result of a car accident).

42. 195 Minn. 378, 380, 263 N.W. 154, 155-56 (1935). "If this rule were to be extended as plaintiffs would have us do, then, carried to its logical conclusion, there would, in many accident cases, be litigation almost without end, all based upon a single tort and only one individual physically involved in the accident itself." *Id.*

43. *Id.*

44. Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 997 (Alaska 1987).

45. Weitl v. Moes, 311 N.W.2d 259, 270 (Iowa 1981). "If a child's consortium claim is brought separately, the burden will be on the child plaintiff to show why joinder was not feasible." *Id.* at 270. *See also* Ueland v. Reynolds Metals Co., 103 Wash. 2d 131, 137, 691 P.2d 190, 194 (1984).

46. Theama v. City of Kenosha, 117 Wis. 2d 508, 536, 344 N.W. 2d 513, 521 (1984). "We note that the fear of an increase in litigation has been voiced in almost every instance where the courts have been asked to recognize a new cause of action." *Id.* The court is asserting that the argument is always raised in arguing against recognizing a new cause of action. Therefore, the argument carries little weight.

47. *Hibpshman*, 734 P.2d at 996.

48. Note, *Torts - Negligent Injury to Parents - The Case for The Child's Right to Recover for Loss of Parental Society and Companionship Mueller v. Hellrung Con-*
str. Co., 101 Ill. App. 3d 337, 437 N.E.2d 789 (5th Dist.), leave to appeal denied, 91

of action could result in settling more cases out of court which would relieve to some degree the problem of overcrowded court dockets.[49]

D. Uncertainty of Damages

Some courts have denied recognition of the child's loss of consortium action due to the difficulty and uncertainty in assessing damages.[50] The Washington Supreme Court, in *Ueland v. Reynolds Metal Co.*,[51] rejected this argument because the child's loss of consortium is no more uncertain than the previously recognized loss of consortium claims of either the husband or wife.[52] The court further asserted that even though a monetary award is a poor method of compensating a child, it is currently the only method that our legal system can provide.[53]

Similarly, the Wisconsin Supreme Court, in *Theama v. City of Kenosha*,[54] concluded that while a monetary award cannot compensate for the child's loss, it is the preferred alternative to completely denying recovery.[55] The logic that a monetary award can diminish the potentially harmful emotional side effects is especially significant for a child

---

Ill. 2d 571 (1982), S. ILL. L. J. 557, 568 (1982) [hereinafter *Torts*].

49. Note, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, 56 B.U.L. REV. 724, 733 (1976) [hereinafter *Child's Right*].

50. Suter v. Leonard, 45 Cal. App. 3d 744, 120 Cal. Rptr. 110 (Ct. App. 1975); Hoffman v. Dautel, 189 Kan. 165, 368 P.2d 57 (1962); Russell v. Salem Transp. Co., 61 N.J. 502, 295 A.2d 862 (1972); Duhan v. Milanowski, 75 Misc. 2d 1078, 348 N.Y.S.2d 696 (1973).

51. 103 Wash. 2d 131, 69 P.2d 190 (1984).

52. *Id.* at 132-38, 691 P.2d at 191-97.

53. *Id.* at 138-39, 691 P.2d at 194.

54. 117 Wis. 2d 508, 344 N.W.2d 513 (1984).

55. *Theama*, 117 Wis. 2d at 515, 344 N.W.2d at 520. Borer v. Am. Airlines, Inc., 19 Cal. 3d 441, 445, 563 P.2d 858, 862, 138 Cal. Rptr. 302, 306 (1977). "To say that plaintiffs have been compensated for their loss is superficial; in reality they have suffered a loss for which they can never be compensated; they have obtained, instead, a future benefit essentially unrelated to that loss." *Id.* at 445, 563 P.2d at 862, 138 Cal. Rptr. at 16. The court further asserted that the difficulty in ascertaining damages is too difficult of a task for the jury. The court reasoned that the jury is unable to differentiate "the loss to the mother from her inability to care for her children from the loss to the children from the mother's inability to care for them." *Id.* at 446, 563 P.2d at 863, 138 Cal. Rptr. at 307. The court refused to recognize a nonstatutory cause of action for the children's loss of parental consortium. *Id.* at 449, 563 P.2d at 866, 138 Cal. Rptr. at 310.

who has suffered the loss of the injured parent's consortium.[56] The monetary award would allow the family to obtain live-in help or other services to help substitute for the child's loss.[57]

The *Hibpshman* court concluded that the difficulties and uncertainties in assessing damages are overstated.[58] The court concurred with other jurisdictions in its analysis that there is "no reason to consider the calculation of damages for a child's loss of parental consortium any more speculative or difficult than that necessary in other consortium, wrongful death, emotional distress, or pain and suffering actions."[59]

---

56. *Child's Right*, *supra* note 49, at 734.

57. *Id.*

58. Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 996 (Alaska 1987).

59. *Id.*; Berger v. Weber, 411 Mich. 1, 3, 303 N.W.2d 424, 426-27 (1981)("children may recover for the loss of society and companionship of a parent who is negligently killed under the Michigan wrongful death act." *Id.*). MICH. COMP. LAWS § 600.2922 (1986) provides in part:

> (1) Whenever the death of a person or injuries resulting in death shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, in respect thereof, then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. All actions for such death, or injuries resulting in death, shall be brought only under this section. (2) Every such action shall be brought by, and in the names of, the personal representatives of such deceased person, and in every such action the court or jury may give such damages, as, the court or jury, shall deem fair and just, under all of the circumstances to those persons who may be entitled to such medical, hospital, funeral and burial expenses for which the estate is liable and reasonable compensation for the pain and suffering, while conscious, undergone by such deceased person during the period intervening between the time of the inflicting of such injuries and his death. The amount of damages recoverable by civil action for death caused by the wrongful act, neglect or fault of another may also include recovery for the loss of the society and companionship of the deceased. Such person or persons entitled to such damages shall be of that class who, by law, would be entitled to inherit the personal property of the deceased had he died intestate. The amount recovered in every such action shall be distributed to the surviving spouse and next of kin who suffered injury and in proportion thereto. Within 30 days after the entry of such judgment, the judge before whom such case was tried or his successor shall certify to the probate court having jurisdiction of the estate of such deceased person the amount and date of entry thereof, and shall advise the

While it is true that determining damages for loss of parental consortium is difficult, to permit the tortfeasor to escape liability only because the damages are somewhat uncertain "would be a perversion of the fundamental principles of justice."[60] Courts and juries constantly make decisions and render verdicts in which the exact extent of the injuries and the amount of damages are difficult to ascertain.[61] Damages for loss of consortium would be no more difficult to determine than other actions for damages courts and juries make everyday. For example, damages are traditionally difficult to ascertain in negligent infliction of emotional distress cases. Negligent infliction of emotional distress typically involves a plaintiff who, while in a position of complete safety, witnesses an injury to another person which produces an adverse emotional reaction in the plaintiff.[62] The early cases denied recovery under a negligence theory in the absence of a demonstrable

---

> probate court by written opinion as to the amount thereof representing the loss suffered by the surviving spouse and all of the next of kin, and the proportion of such total loss suffered by the surviving spouse and each of the next of kin of such deceased person, as shown by the evidence. After providing for the payment of the reasonable medical, hospital, funeral and burial expenses for which the estate is liable, the probate court shall determine as provided by law the manner in which the amount representing the total loss suffered by the surviving spouse and next of kin shall be distributed, and the proportionate share thereof to be distributed to the surviving spouse and the next of kin. The remainder of the proceeds of such judgment shall be distributed according to the intestate laws. The injury here is no more remote than the injury sustained when the parent is negligently killed.

Northwest v. Presbyterian Intercommunity Hosp., 293 Or. 538, 543, 652 P.2d 318, 323 (1982). "We accept the view that a parent's disablement is likely to mean a painful and possibly permanent psychic injury to a child, although one to be proved in the individual case, and that in principle it is no more or less compensable in money than other psychic injuries for which damages are allowed." *Id.* However, the child's injury is not a result of the defendant's negligence to the child, the child's injury is a consequence of the mother's injury and that ordinary negligence is only compensable to the party directly injured. *Id.* at 552, 652 P.2d at 332-33. Hay v. Med. Center Hosp., 145 Vt. 539, 543, 496 A.2d 939, 943-44 (1985); Theama v. City of Kenosha, 117 Wis. 2d 502, 508, 344 N.W.2d 513, 519-20 (1984). "These elements appear to involve damages which are by nature as intangible as those for the loss of a parent's society and companionship. Yet courts and juries daily assess such uncertainties, with apparent success." *Id.*

60. *Child's Cause of Action, supra* note 32, at 456.

61. *See also* Comment, *Consortium*, 34 S. CAL. L. REV. 334, 341 (1961).

62. EPSTEIN, GREGORY & KALMEN, CASES AND MATERIALS ON TORTS 1050 (4th ed. 1984).

physical manifestation of the tort.[63] In *Mitchell v. Rochester Railway Co.*,[64] the plaintiff was almost run down by a team of defendant's horses. As a result, the plaintiff became unconscious, had a miscarriage and consequent illness.[65] The court denied recovery on the ground that the injury complained of can be easily feigned, and that the damages are purely speculative.[66]

However, in *Dillon v. Legg*,[67] the court permitted a mother's recovery after witnessing the defendant, while driving his car, run down and kill her child.[68] The plaintiff suffered nervous shock as a result of the defendant's negligence.[69] The *Dillon* court asserted that even though "the application of tort law can never be a matter of mathematical precision . . . we cannot let the differences of adjudication frustrate the principle that there be a remedy for every substantial wrong."[70] Therefore, since there is a substantial wrong to the child when the parent is negligently injured, difficulty in ascertaining the child's damages should not be the basis for denying the child's action.

E. The Possibility of Double Recovery

Courts have held that recognizing a loss of parental consortium claim could result in a serious danger of double recovery.[71] The *Hoffman* court asserted that "juries as a matter of fact consider the plight of young children in fixing damages where the parent is seriously injured."[72] Thus, recognizing the child's action could result in the child recovering for loss of parental consortium and simultaneously recovering for loss of the parent's support in the parent's personal injury claim.[73]

---

63. PROSSER, LAW OF TORTS § 54 at 361 (5th ed. 1974).
64. 151 N.Y. 107, 45 N.E. 354 (1986).
65. *Id.* at 109-10, 45 N.E. at 354-55.
66. *Id.*
67. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
68. *Id.* at 730, 441 P.2d at 914, 69 Cal. Rptr. at 74.
69. *Id.*
70. *Id.* at 735, 441 P.2d at 919, Cal. Rptr. at 79.
71. Hankins v. Derby, 211 N.W.2d 581, 582 (Iowa 1973); Hoffman v. Dautel, 189 Kan. 165, 368 P.2d 57 (1962).
72. *Hoffman*, 189 Kan. at 167, 368 P.2d at 59 (1962).
73. Russell v. Salem Transp. Co., 61 N.J. 502, 504, 295 A.2d 862, 864 (1972). "The asserted social need for the disputed cause of action may well be qualified, at least in [illegible] family as an economic unit, by the practical consideration recognized by many of the cases on the point that reflection of the consequential disadvan-

The *Hibpshman* court rejected this argument and asserted that double recovery is avoided by limiting damages for lost income to the parent and limiting the child's damages in most cases to emotional distress.[74] The *Hibpshman* court also agreed with the *Ueland* court that double recovery is avoided by properly instructing the jury that the child's damages are separate and distinct from the parent's.[75] Therefore, double recovery is not a valid reason to deny recognition of the child's claim.[76]

F. Increased Insurance Rates

In *Hibpshman*, the Alaska Supreme Court also rejected the argument that recognizing the child's action for loss of parental consortium would result in increased insurance rates.[77] The court reasoned, "[a]ny burden to society is offset by the benefit to the child."[78] In *Berger v. Weber*,[79] the plaintiff's mother was severely injured in an automobile accident.[80] The father as next friend of their mentally retarded daughter, brought an action on her behalf for loss of her mother's consortium.[81] The Michigan Supreme Court stated that:

> [r]ecognizing the child's cause of action may result in increased

---

tages to children of injured parents is frequently found in jury awards to the parents on their own claims under existing law and practice." *Id.* The court is merely asserting that juries in assessing damages take into consideration the needs of the children. Therefore, since the children's needs are recognized and taken care of in juries' award to the parent, permitting the children to maintain another individual cause of action results in double recovery by the children. *Id.*

74. Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 996 (Alaska 1987).

75. *Id. See also* Ueland v. Reynolds Metals Co., 103 Wash. 2d 131, 135-36, 691 P.2d 190, 194-95 (1984).

76. Theama v. City of Kenosha, 117 Wis. 2d 508, 517, 344 N.W.2d 513, 522 (1984).

77. *Hibpshman*, 734 P.2d at 996.

78. *Id. See also* Hay v. Med. Center Hosp., 145 Vt. 533, 540, 496 A.2d 939, 946 (1985); *Ueland*, 103 Wash. at 691 P.2d at 190, 195; *Theama*, 117 Wis. 2d at 516, 344 N.W.2d at 513, 521. "However, we believe that any burden to society is offset by the benefit to the child, who through compensation may be able to adjust to his or her loss with stability. Ultimately, society will benefit as well, since ideally the child will become a normal adult who is capable of functioning as such in his or her own setting." *Theama*, 117 Wis. 2d at 516, 344 N.W. 2d at 521.

79. 411 Mich. 1, 303 N.W.2d 424 (1981).

80. *Id.*

81. *Id.* at 426.

argument runs, why not hold the defendant liable to a cousin, or even a neighbor, who benefitted from the injured person's companionship and affection?"[89] The question arises of where to draw the line between holding the defendant liable or not liable.[90] Given the hesitancy of courts to recognize the doctrine of parental consortium[91] and the ability of the courts to limit the action to the child most affected by the parent's injury,[92] it is unsound to base non-recognition on the fear that

---

89. *Child's Right*, *supra* note 49, at 736-37.

90. *Parent-Child Relationship*, *supra* note 86, at 605.

> Those courts that refuse to recognize a parent's or child's action know that brothers and sisters, grandparents and grand-children as well as aunts, uncles, nieces and nephews are waiting in the wings. Although the line must be drawn somewhere, there is no reason to draw it between an action for lost society and companionship caused by the tortious infliction of death to a parent or child and an action for the same type of damage caused by physical injury; nor need it be drawn between a spouse's action for loss of consortium and a parent or child's action for lost society and companionship.

Id. Thus, some courts believe that if the door is opened to recognize the child's action, it is only a matter of time before the whole family will want to maintain an action for their loss. *Id.*

91. The vast majority of courts have expressly refused to recognize a child's claim based on loss of parental consortium. *See* Early v. United States, 474 F.2d 756 (9th Cir. 1973) (applying Alaska law); Pleasant v. Washington Sand & Gravel Co., 262 F.2d 471 (D.C. Cir. 1958) (District of Columbia law); Meredith v. Scruggs, 244 F.2d 604 (9th Cir. 1957) (per curiam) (Hawaii law); Hoesing v. Sears, Roebuck & Co., 484 F. Supp. 478 (D. Neb. 1980) (Nebraska law); Turner v. Atlantic Coast Line R. R., 159 F. Supp. 590 (N.D. Ga. 1958) (South Carolina law); Jeune v. Del E. Webb Constr. Co., 77 Ariz. 226, 269 P.2d 723 (Ariz. 1954), overruled on other grounds, City of Glendale v. Bradshaw, 108 Ariz. 582, 503 P.2d 803 (1972); Lewis v. Rowland, 287 Ark. 474, 701 S.W.2d 122 (1985); Borer v. American Airlines, 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977); Zorzos v. Rosen, 467 So. 2d 305 (Fla. 1985); W. J. Bremer Co. v. Graham, 169 Ga. App. 115, 312 S.E.2d 806 (Ct. App. 1983), writ denied, 252 Ga. 36, 312 S.E.2d 787 (1984); Mueller v. Hellrung Constr. Co., 107 Ill. App. 3d 337, 437 N.E.2d 789 (1982); Hoffman v. Dautel, 189 Kan. 165, 368 P.2d 57 (1962); Hickman v. Parish of East Baton Rouge, 314 So. 2d 486 (La. Ct. App.), writ refused, 318 So. 2d 59 (La. 1975); Salin v. Kloempken, 332 N.W.2d 736 (Minn. 1982); Bradford v. Union Elec. Co., 598 S.W.2d 149 (Mo. App. 1979); Russell v. Salem Transp. Co., 61 N.J. 502, 295 A.2d 862 (1972); DeAngelis v. Lutheran Med. Center, 84 A.D.2d 17, 445 N.Y.S. 2d 188 (App. Div. 1981), aff'd, 58 N.Y.2d 1053, 449 N.E.2d 406, 462 N.Y.S.2d (1983) 626; Morgel v. Winger, 290 N.W.2d 266 (N.D. 1980); Gibson v. Johnston, 144 N.E.2d 310 (Ohio App. 1956), appeal dismissed, 166 Ohio St. 288, 141 N.E.2d 767 (1957); Norwest v. Presbyterian Intercommunity Hosp., 293 Or. 543, 652 P.2d 318 (1982).

92. Theama v. City of Kenosha, 117 Wis. 2d 508, 515, 344 N.W.2d 513, 521

unlimited liability will result if loss of parental consortium is recognized as a cause of action.

H. Intrafamilial Disputes

In *Hibpshman*, the defendant argued that allowing the child's independent recovery would disrupt the normal family pattern whereby the parents have full control over family expenditures.[93] The Alaska Supreme Court did not believe that recognizing parental consortium claims would result in injury to the intrafamilial relationship.[94] The court asserted that "the possibility of a threat to family harmony is no different from that which arises in other cases involving family litigation, including wrongful death actions."[95] Further, the Alaska Legislature impliedly refused to recognize family disharmony as an important consideration by permitting independent recovery by family members in wrongful death claims.[96] The court concluded by stating that potential intrafamilial disputes were rejected as a ground for denying recovery in other actions which had a much greater chance of disrupting the family than a claim against a third party.[97]

I. Lack of a Duty to the Child

In *DeAngelis v. Lutheran Medical Center*,[98] three minor children brought a claim for loss of parental consortium.[99] The mother was

---

(1984); Weitl v. Moes, 311 N.W.2d 259, 267 (Iowa 1981).

93. Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 995 (Alaska 1987).

94. *Id.*

95. *Id.*

96. *Id.*; ALASKA STAT. § 09.55.580(A) (1982) provides in part:

> When the death of a person is caused by the wrongful action or omission of another, the personal representatives of the former may maintain an action therefore against the latter, if the former might have maintained an action, had the person lived, against the latter for an injury done by the same act or omission. The action shall be commenced within two years after the death, and the damages therein shall be the damages the court or jury may consider fair and just. The amount recovered, if any, shall be exclusively for the benefit of the decedent's spouse and children when the decedent is survived by a spouse or children, or other dependents.

97. *Hibpshman*, 734 P.2d at 995.

98. DeAngelis v. Lutheran Med. Center, 84 A.D.2d 117, 445 N.Y.S. 2d 188 (App. Div. 1981).

99. *Id.*

treated for abdominal pains resulting from a previous operation.[100] The *DeAngelis* court noted that the principle of duty serves to limit the extent of a tort-feasor's liability for negligence.[101] The Court added that the defendant has no duty to the children and "in the absence of duty, there is no breach and therefore no liability."[102] The Court concluded that although the children's injuries are foreseeable, foreseeability by itself is not sufficient to establish a duty.[103]

Some courts have held the fundamental public policy of protecting children necessitates recognizing the child's claim for loss of consortium.[104] One commentator noted that duty and foreseeability are nothing more than an artificial means of determining the scope of a tort-feasor's liability.[105] Therefore, lack of duty towards the child should not be a basis for denying the child's claim because logically the fundamental public policy of protecting children must outweigh the artificial concepts of determining duty and foreseeability.

III. Comparison of Florida's and Alaska's Positions

In *Rosen By and Through Rosen v. Zorzos*,[106] the Florida Fifth District Court of Appeal held that a minor child may maintain a claim for loss of parental consortium arising out of injuries to the parent negligently caused by a third party.[107] The *Rosen* court disagreed with the *Clark* court's arguments that the legislature should decide the issue and that lack of precedent compels non-recognition of the claim.[108]

The *Rosen* court argued that, first of all, in many cases, Florida courts have not waited for legislative action when a change in the common law is needed;[109] and second, the lack of precedent argument is no

---

100. *Id.* at 119, 445 N.Y.S. 2d at 190.

101. *Id.* at 121-22, 445 N.Y.S. 2d at 192-93.

102. *Id.*

103. *Id.*

104. Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991 (Alaska 1987); Theama v. City of Kenosha, 117 Wis. 2d 508, 344 N.W. 2d 513 (1984); Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E. 2d 690 (1980).

105. Note, *DeAngelis v. Lutheran Medical Center: Its Impact And Effect On The Child's Right To Parental Consortium*, 12 CAP. U.L. REV. 457, 469 (1983).

106. 449 So. 2d 359 (Fla. 5th Dist. Ct. App. 1984) (six minor children filed separate loss of consortium actions as a result of injuries to father).

107. *Id.*

108. *Id.*

109. Gates v. Foley, 247 So. 2d 40 (Fla. 1971) (holding wife of injured husband has a "right of action against negligent third party for her loss of consortium." *Id.*);

longer valid because other jurisdictions have recognized loss of consortium as a valid cause of action,[110] thus establishing non-binding precedent, but precedent nonetheless. Following the rejection of the *Clark* court's rationale, the court enumerated several reasons underlying their willingness to recognize loss of parental consortium.[111]

Related claims such as a wife or husband maintaining an action for the other's loss of consortium are recognized under Florida law.[112] In *Gates v. Foley*,[113] the Florida Supreme Court recognized that a wife has a right to maintain an action for loss of her husband's consortium.[114] The court recognized that the wife had suffered a real loss that should be compensated.[115] Since the wife is an adult, she should conceivably handle the loss better than a child.[116] The child's dependence on his parents is much greater than the wife's dependence on her husband.[117] Yet, the court recognized that the wife has suffered a real loss that should be compensated but would not recognize the same compensable loss to the child.[118] This is an inconsistency that should not be a ground for denying the child's action.

Moreover, Florida's wrongful death statute provides for recovery to the surviving spouse or minor child if the spouse or parent dies be-

---

Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973) (Supreme Court of Florida "may change the rule where great social upheaval dictates." *Id.*); Randolph v. Randolph, 146 Fla. 491, 1 So. 2d 480 (1941) (judiciary modified the common law that the father doesn't necessarily have a superior right to custody of a child); Banfield v. Addington, 104 Fla. 661, 140 So. 893 (1932) (judicial removal of common-law exception of a married woman from causes of action based on contracts or mixed contracts in torts); Waller v. First Savings & Tr. Co., 103 Fla. 1025, 138 So. 780 (1931) (judiciary retreated from "common law principle that an action for personal injuries was abated upon death of tortfeasor." *Id.*); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957) ("a municipal corporation may be held liable for the torts of police officers under the doctrine of Respondent Superior." *Id.*).

110. Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (1980); Berger v. Weber, 411 Mich. 1, 303 N.W.2d 424 (1981); Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981).

111. Clark v. Suncoast Hosp., Inc., 338 So. 2d 1118 (Fla. 2d Dist. Ct. App. 1976).

112. *Gates*, 247 So. 2d at 40.

113. *Id.*

114. *Id.*

115. *Recovery*, *supra* note 26, at 202.

116. *Id.*

117. *Id.*

118. *Id.*

cause of a third party's negligence.[119] It is Florida's policy to shift the loss from the decedent's survivors to the wrongdoer.[120] Denying the child's cause of action when the parent is seriously injured goes completely against the policy of placing the loss on the negligent party.[121]

Furthermore, it is logically inconsistent to argue that a parent can maintain an action for the loss of the child's consortium when the child is negligently injured,[122] but the child cannot when the parent is negligently injured.[123] Due to the conflict between the decisions in Florida's Second and Third District Courts of Appeal, the Fifth District Court of Appeal certified this question to Florida's Supreme Court.[124]

The Florida Supreme Court, by a four to two vote, reversed the *Rosen* decision on the grounds that the legislature is best able to deliberate and weigh the various arguments for or against permitting such claims; and since the legislature permits a parental consortium action when the parent is killed but does not when the parent is injured, this implies that the legislature has deliberately refused to recognize such an action.[125]

The dissent stated that while it was influenced by what the legislature actually did, the dissent was unpersuaded by what the legislature did not do.[126] The dissent further stated that the wrongful death statute, which was revised in 1972, was nothing more than a compromise between opposing factions.[127] Therefore, by implication the statute

---

119. FLA. STAT. § 768.21(a) (1983) provides in part:
> The surviving spouse may also recover for loss of the decedent's companionship and protection and for mental pain and suffering from the date of the injury. Three minor children of the decedent may also recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of the injury.

120. FLA. STAT. § 768.17 (1983).
121. *Recovery*, *supra* note 26, at 200-01.
122. Wilkie v. Roberts, 91 Fla. 1064, 1066, 109 So. 225, 227 (1926).
123. Rosen By and Through Rosen v. Zorzos, 449 So. 2d 359, 362 (Fla. 5th Dist. Ct. App. 1984).
124. *Id.* at 364.
125. Zorzos v. Rosen By and Through Rosen, 467 So. 2d 305 (Fla. 1985).
126. *Id.* at 307.
127. *Id.*
> This statutory scheme had many shortcomings which oft times caused unjust results and brought about many hardships. The general overhauling of the wrongful death statute in 1972 was the result of many years of infighting between forces with opposing points of view. The defense bar was generally satisfied with the status quo. The plaintiff's bar wanted to broaden the list of those who could recover for the death of a family mem-

should not be read to completely and accurately reflect the will of the legislature.[128] The legislature might very well have been inclined to recognize loss of parental consortium as a legal action when the parent is injured; however, the legislature was unable to do so due to the various compromises being made.[129]

The dissent next argued that since a minor child can recover for damages from the date of the parent's injury to the parent's death "without regard to whether that period is but a fleeing moment or is one of years," the child should be entitled to recover if the parent does not die.[130] The dissent concluded by asserting that "the legislature has recognized the validity of this claim where the injury to the parent is fatal. We should recognize it where the parent survives. The loss is present in either circumstance."[131]

In *Zorzos*, the Florida Supreme Court majority erred when it asserted that the legislature should decide the issue as to whether loss of parental consortium is recognized due to the legislature's greater ability to study and circumscribe the issue.[132] Courts are equally as competent as the legislature to make needed changes in the common law.[133] Also, it would be inappropriate to wait for the legislature to act when the courts have the authority and competency to make the needed changes

---

> ber and to extend the elements of damage for each person entitled to recover. Although not the proper subject of judicial notice, it is generally known that the 1972 amendment was the result of a series of compromises between the various points of view in and outside the legislature and was enacted without any great blood-letting on the floors of the legislature. Included in the overall compromise was the repeal of the survivor statute, pursuant to which the personal representative could recover damages for loss of earnings and conscious pain and suffering of the decedent from the date of the injury to the date of the death. The enactment of this new wrongful death statute was not part of a general legislative attempt to overhaul tort law. The entire legislative battle centered around the wrongful death statute. I therefore can draw no inference from the fact that the legislature addressed a narrow segment of tort law by enacting the new death statute, and did not attempt an overall revision of this area of the law. This was nothing more and nothing less than the legislative process in action.

Id.

128. *Id.* at 308.
129. *Id.*
130. *Id. See* FLA. STAT. § 768.21(a) (1983).
131. Zorzos v. Rosen By and Through Rosen, 467 So. 2d 305, 308 (Fla. 1985).
132. *Id.* at 307.
133. *Friedman*, *supra* note 23, at 839.

in the common law.[134] Additionally, the legislature does not have the time or resources to keep up with all the changes that need to be made due to overcrowded legislative agendas and a factionalized legislature.[135] As a practical matter, it could be years before the issue is addressed. Furthermore, loss of consortium is a judicially created action.[136] It first evolved from recognition of the husband or father's cause of action[137] to include both the wife's[138] and the parent's cause of action.[139] It is not necessary to involve the legislature in recognizing the further evolution to include the child's action.[140]

The *Zorzos* majority also erred in their conclusion that since parental consortium was recognized when the parent died but not when the parent was injured, the legislature must have intended this result or they would have expressly extended recognition to include injuries when the legislature amended the wrongful death statute in 1972.[141] The *Zorzos* dissent accurately determined the underlying reason for the non-recognition of the action as no more than a compromise between opposing factions.[142] Therefore, the statute does not completely and accurately reflect the will of the legislature.[143]

In contrast, the Alaska Supreme Court in *Hibpshman* recognized that minor children have an independent cause of action for loss of parental consortium when their parents are negligently injured by a third party.[144] The Alaska Supreme Court accepted the challenge of recognizing a new cause of action by rejecting the arguments enumerated in *Zorzos* along with other arguments that different jurisdictions have traditionally relied on to justify non-recognition of the action.[145]

In *Hibpshman*, the father, Thomas Hibpshman, was critically injured while working on Alaska's north slope.[146] The father brought a

---

134. Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 995 (Alaska 1987).
135. *Right of a Child*, *supra* note 31, at 477, 480.
136. *Child's Right*, *supra* note 49 and accompanying text.
137. *Id.* at 724.
138. Hitaffer v. Argonne Co., 183 F.2d 811, 816 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).
139. Shockley v. Prier, 66 Wis. 2d 394, 225 N.W.2d 499 (1975).
140. Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 995 (Alaska 1987).
141. Zorzos v. Rosen By and Through Rosen v. Zorzos, 467 So. 2d 305 (Fla. 1985).
142. *Id.* at 308.
143. *Id.*
144. *Hibpshman*, 734 P.2d at 991.
145. *Id.*
146. *Id.*

personal injury claim against Prudhoe Bay Supply, Inc., and Alaska Explosives, Ltd., "alleging negligent breach of a duty to provide premises free from unreasonable defects and hazards."[147] Mrs. Hibpshman brought a cause of action for loss of spousal consortium in the same complaint.[148]

The Hisbpshmans' four minor children brought a separate claim against the same defendants for loss of parental consortium.[149] The defendants "moved to dismiss the children's complaint, on the ground that it failed to state a claim upon which relief can be granted, or to consolidate the children's claim with those of their parents."[150] The Alaska Superior Court dismissed the loss of parental consortium claim and the children appealed that order.[151]

The Alaska Supreme Court acknowledged loss of parental consortium as a claim upon which relief could be granted because it found "the analysis of those decisions which have recognized the cause of action more persuasive than that of the decisions which have not."[152] First, the court recognized that children of injured parents suffer a real injury.[153] The child suffers "a loss of enjoyment, care, guidance, love and protection and is also deprived of a role model" when the parent is injured.[154] Second, even jurisdictions that deny recovery for loss of parental consortium have recognized that a child suffers an emotional and psychological injury when the parent is injured.[155] Third, Alaska's wrongful death statute inferentially permits a child to recover for lost parental consortium when the parent is injured.[156] Fourth, loss of parental consortium cannot be sufficiently distinguished from previously

147. *Id.*
148. *Id.*
149. *Id.* at 991-92.
150. *Id.* at 992.
151. *Id.*
152. *Id.* at 994.
153. *Id.*
154. Theama v. City of Kenosha, 117 Wis. 2d 508, 344 N.W.2d 513 (1984).
155. Borer v. Am. Airlines, Inc., 19 Cal. 3d 441, 453, 563 P.2d 858, 866, 138 Cal. Rptr. 302, 310 (1977). "We are keenly aware of the need of children for the love, affection, society and guidance of their parents; any injury which diminishes the ability of a parent to meet these needs is plainly a family tragedy, harming all members of that community." *Id.* at 866. DeAngelis v. Lutheran Med. Center, 84 A.D.2d 17, 445 N.Y.S.2d 188, 190 (1982); Norwest v. Presbyterian Intercommunity Hosp., 293 Or. 543, 548, 557, 652 P.2d 318, 321, 332 (1982).
156. *Hibpshman*, 734 P.2d at 994.

recognized consortium actions to warrant denying the action.[157]

The reasons upon which the Alaska Supreme Court has based its decision are very persuasive and logical. The Court guided its decision by the basic tenet of tort law: that a real injury should be compensated. Moreover, the court recognized no logical distinction exists between loss of companionship when the parent dies or is severely crippled or suffers brain damage. The child is more severely injured because of the ongoing nature of the parent's injury than if the parent had died. If the parent dies, the child will eventually accept the parent's death and continue on with his or her life. However, if the parent is severely crippled or suffers brain damage, the child is continually faced with the tragedy that befell the family. Thus, there is even more of a reason to compensate the child. In addition, it is unsound for jurisdictions to recognize that there is an actual injury but to then deny a cause of action for that injury. Furthermore, the distinctions between the previously recognized consortium actions and parental consortium are minimal at best. Just as the husband or wife values and needs the companionship of the other spouse, the child also values and needs the companionship of the parents. If the companionship and guidance are taken away by a negligent act, it is only equitable to allow compensation for this loss.

Nevertheless, a weakness in the *Hibpshman* court's analysis is that there is no qualification on the extent of the parent's injury before the child has a right to maintain a cause of action. According to *Hibpshman*, if the parent is not seriously injured, the child has not been deprived of the parent's consortium and should not be allowed to maintain a cause of action.[158] However, if a parent is severely crippled or suffers brain damage, the child is deprived of the parent's consortium and should be compensated.[159] Defining in advance what comprises a serious injury is a virtual impossibility. Accordingly, the jury should determine what qualifies as a serious injury from the specific facts of each case. Therefore, the cause of action for parental consortium should be maintained if the jury determines that a serious injury exists.

---

157. *Id.*

158. Comment, *Washington Expands a Child's Cause of Action For Loss of Parental Consortium; Ueland v. Reynolds Metals Co., 103 Wash. 2d 131; 691 P.2d 190 (Wash. 1984)*, 20 GONZ. L. REV. 601 (1984).

159. *Id.*

IV. Conclusion

The Florida Supreme Court's failure to expand tort liability to include the child's actions for loss of parental consortium underscores the court's failure to fully understand the reasoning upon which it based its decision to deny recognition. Instead of accepting the challenge of creating a new cause of action, the Florida Supreme Court chose to accept the path of least resistance by practicing judicial restraint and deferring to the legislature. Instead of recognizing that Florida's wrongful death statute impliedly permits a loss of consortium action in injury as well as death, the *Zorzos* court was persuaded in part by an amended statute which resulted from a compromise between opposing factions as their other reason for denying recognition of the action.

Fortunately for Alaska's children, the Alaska Supreme Court did not lack the insight to appreciate the fundamental importance of protecting the parent-child relationship or the fortitude to dismiss unpersuasive arguments. The *Hibpshman* court correctly recognized that loss of consortium is a judicially created cause of action and that deferring to the legislature would be a shirking of judicial responsibility in adapting the law to society's needs when the legislature has failed to act.[160]

The Alaska Supreme Court understood the fundamental importance of the parent-child relationship and that it is vital that the child have a means of adjusting to the loss of the ability of parents to engage in parental care and affection.[161] The court also recognized that the child suffers a real emotional and psychological injury when the parent is seriously injured as well as when the parent is killed.[162] Since the child's injury is present in either event, recovery should not be denied.[163] The court acknowledged the unsound reasoning of other jurisdictions who recognize that an actual inquiry exists yet deny an action for that injury. The court reasoned that the distinction between the previously recognized consortium claims are negligible at best. Just as one spouse values and needs the companionship of the other spouse, so does the child value and need the companionship of the parent. If the companionship and guidance are taken away by the negligent act of a third party, it is only reasonable and just to permit compensation for

160. *Hibpshman*, 734 P.2d at 995.
161. *Id.* at 994.
162. *Id.*
163. *Id.*

this loss. It is eminently logical to allow compensation for this very real harm to the child.

Keith Metcalf